No. 718

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, Appellant

v.

MICHAEL WALSH, an Individual Trading as KELP LABORATORIES, Appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

STATEMENT OF CASE

In April, 1946 the information in this matter was filed charging the appellee Michael Walsh, an individual trading as Kelp Laboratories, with giving a false guaranty under Sections 331 (h) of U.S.C., Title 21, the Federal Food, Drug and Cosmetic Act (Section 301 (h) of Act) (R. 1-5). The information contains two counts, the first charging the guaranty to be false because the food, consisting of vitamin capsules and tablets, was adulterated and the second charging a false guaranty because the food was misbranded (R. 1-5). The defect charged was that the

food contained less than 10 milligrams of niacinamide. The information states that the Kelp Laboratories on February 23, 1943, two years before the alleged offense, gave to Richard Harrison Products of Hollywood, California a continuing guaranty that the products thereafter shipped to Richard Harrison Products would not be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act (R. 1-2). This guaranty is not stated to be attached to any shipment or that there is any statement or sign on any shipment that it is so guaranteed or that any shipment had any such guaranty or sign on it that would segregate it from the volume of intrastate shipments or business dong by the Kelp Laboratories or Richard Harrison Products. Each count stated that on or about February 24, 1945, while the guaranty was in force, the defendant delivered at San Diego, State of California, for shipment to Hollywood, State of California, consigned to Richard Harrison Products, the food in question (R. 2). Each count stated that on or about the date last mentioned and prior and subsequent thereto, Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce similar food products supplied by defendant (R. 3). The information is silent as to the large amount of intrastate business that Richard Harrison Products did in California or as to the large intrastate business of the manufacturer, Kelp Laboratories. A California dealer in vitamin products manufactured there or a manufacturer in California would naturally do a great volume of business in California. Nothing in the information shows whether the commerce in the shipment in question had lost its character as purely

intrastate business of the manufacturer or of Richard Harrison Products and had moved into the situation where it could be held to be in the channels of interstate business. So far as the information states, the shipment was still moving wholly within the flow of intrastate commerce and was integrated into local business. There is no statement whatever in the information that this product ever moved in interstate commerce or was ever intended by either the dealer or the defendant to move into interstate commerce. So far as the allegations of the information allege, this shipment only went from San Diego to Hollywood in the State of California. On motion of defendant, the information was dismissed because it did not state an offense.

QUESTIONS PRESENTED

Defendant, in support of his motion to dismiss and the District Court's action thereon, asserts that:

1. Congress did not intend that Sec. 301 (b) should relate to products moving wholly intrastate;

2. If Congress had made a provision in the Act broad enough to make that an offense, then such provision would have been an unwarranted interference with intrastate business and unconstitutional; and

3. If either of the above points are affirmed, the information does not state an offense and was properly dismissed.

ARGUMENT

PART I.

CONGRESS DID NOT INTEND TO HAVE THE OFFENSE APPLY TO WHOLLY INTRASTATE TRANSACTIONS.

A. A REASONABLE INTERPRETATION OF THE ACT DERIVED FROM ITS LANGUAGE AND PURPOSE, AND THE RELATION OF ITS SECTIONS SHOWS THAT SECTION 301 (b) [21 U.S.C. 331 (b)] APPLIES ONLY TO SHIPMENTS THAT A DEALER ACTUALLY SENT INTERSTATE.

The Supreme Court of the United States has not construed the Act on the matters in question. We must, therefore, analyze with scrutiny those provisions of that Act itself which may relate to the offense and look not only to the words of the statute and to the relation between the sections of the Act, but also to its purpose.

We should at the outset of the discussion of this point refer to the heading of the final draft of the Act as passed by Congress. This final draft is headed as follows:

"PUBLIC, NO. 117, SEVENTY-FIFTH CONGRESS, CHAPTER 675, THIRD SESSION, S. 5

AN ACT

"To prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices and cosmetics and for other purposes."

The purpose expressed by Congress is not to prohibit the movement of misbranded drugs in intrastate commerce. It is "to prohibit *the movement in interstate commerce*."

The violations by defendant are charged under Sec. 301 (h) [21 U.S.C. 331 (h)] of the Act. The words of that section relating to the offense charged are:

> "The following acts and the causing thereof are hereby prohibited: * * *
>
> "(h) The giving of a guaranty or undertaking referred to in Section 303 (c) (2) [21 U.S.C. 333 (c) (2)], which guaranty or undertaking is false * * *."

This clause relates to the guaranty "referred to in Section 303 (c) (2)". We must first ascertain the purpose, scope and construction of such guaranty or undertaking so that we may know when and how it becomes false, and are therefore driven to examine Sec. 303 (c) (2) of the Act. The reading of that section must assist us in finding when the offense is committed.

Section 303 (c) (2) of the Act sets out the terms of such guaranty or undertaking and how the penalty can be avoided by a dealer *when he places in interstate commerce* an article that is adulterated or misbranded. The words of Sec. 303 (c) (2) referring to those terms material to the offense here charged are:

> "No person shall be subject to the penalties of subsection (a) of this section * * * (2) for having violated section 301 (a) * * * if he establishes a guaranty or undertaking signed by * * *, the person * * * from whom he received in good faith the article, to the effect, in case of an alleged violation of Section 301 (a), that such article is not adulterated or misbranded within the meaning of this Act, designating this Act * * *."

By the terms of Sec. 303 (c) (2) the guaranty or undertaking is given to prevent guilt and punishment for the violation of Section 301 (a). We must read

that section, therefore, and Sec. 303 (a) (2) in conjunction to find the purpose and scope of this guaranty. Its purpose is to prevent punishment for:

> "The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded * * *" Sec. 301 (a).

In the construction of Sec. 303 (c) (2) the important matters are: First, that the purpose is definitely to prevent the dealer, receiving the articles in good faith, from becoming subject to the penalties of Sec. 303 (a) of the Act *"in case of an alleged violation of Section 301 (a)"*, that is *"in case" the dealer moves the product in interstate commerce;* and Second, that the adulteration or misbranding guaranteed against is that "adulteration or misbranding within the meaning of the Act".

Certainty the guaranty protects the dealer in shipments moving in interstate commerce only. Definitely, the purpose is not to guarantee products going intrastate and not within the meaning of the Act but only those that go interstate and come within the meaning of Sec. 301 (a) and within the purpose of the Act, which is "to prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices and cosmetics".

In *Barnes vs. United States*, 142 Fed. Rep., 2d Series, 648, l.c. 650, the Court, understanding this to be the proper construction, states at page 650 as follows:

> "Under the present act persons are subject to its penalties for introducing or delivering for introduction into interstate commerce any foor that is adulterated or misbranded (Sec. 331 (a); 21 U.S.C., Sec. 331 (a), 21 U.S.C.A., 331 (a)).

But liability may be avoided if such persons have obtained a guaranty of the person from whom they in good faith received the product. 21 U.S.C., Sec. 333 (c) (2); 21 U.S.C.A., Sec. 333 (c) (2). Under such circumstances the liability is then imposed upon the guarantor. This imposition of liability is obtained through 21 U.S.C., Sec. 331 (h); 21 U.S.C.A., Sec. 331 (h), which creates a penalty for the giving of a false guaranty. *Thus under the statutory scheme the falsity described in the latter section must be defined in terms of the conduct prohibited by Section 331 (a).*"

(Italics ours.)

The above language was used in discussing the first two counts. These charged an offense under Section 301 (h) of the Act in which the dealer introduced the shipments into interstate commerce. Two other counts charge offenses for other acts of the defendant under Section 301 (a). The above quotation was not used in the discussion of these two other counts.

We must conclude that the guaranty or undertaking can have no reference whatever to any article that was made, transported and used solely intrastate. If the guaranteed person, the dealer, never introduced or delivered for introduction the article into interstate commerce, he would not be subject to any penalties under Sec. 301 (a) and consequently the guaranty would have no application. The guaranteed person needs no protection of a guaranty in intrastate shipments. The Act and the guaranty were not intended to cover such activities or articles. Sections 301 (a) and (h) of the Act contain nothing that makes any act an offense that has to do solely with intrastate transportation or activities. For the purposes of the

Federal Food, Drug and Cosmetic Act, Sec. 201 (b) (21 U.S.C. 321) of the Act sets out the definition of "interstate commerce" as follows:

"(b) The term 'interstate commerce' means (1) commerce between any State or Territory and any place outside thereof ****."

Irrespective of decisions under other Acts, interstate commerce is no broader than that definition in matters arising under the Federal Food, Drug and Cosmetic Act.

The above discussion is no more than the fair reasoning out of the meaning of clause (h) in Section 301 of the Act. This clause (h) cannot be read in isolation. It expressly refers to clause 2 of subparagraph (c) of Section 303 of the Act for the meaning of the guaranty which is to become false. Neither can clause 2 of subparagraph (c) of Section 303 of the Act be read in isolation. It expressly refers to clause (a) of Section 301 for the purpose of the guaranty and its scope and limitations. The language of *U. S. vs. Dotterweich*, 320 U.S. 277, l.c. 280 is apt in this connection: "The guaranty clause cannot be read in isolation." Naturally, all three of these clauses of Section 301 and 303 of the Act must be read together in order to ascertain a definition of the offense set out in clause (h) of Section 301 of the Act and all of these clauses and sections must be analyzed with the overall purpose of the Act in view as expressed in the heading of the bill, which purpose is "to prohibit the movement in interstate commerce of adulterated and misbranded food. . . ."

It is the guaranteed person's "introduction or delivery for introduction into interstate commerce" that

the guaranty protects. That is the intent and scope of the guaranty.

It does not refer to the introduction or delivery for introduction into interstate commerce by the guarantor, which here is the manufacturer, defendant Walsh. Walsh is not charged with any unlawful introduction or delivery for introduction into interstate commerce. It is this dealer's introduction or delivery for introduction of an adulterated or misbranded article and the offense therefor that is to be protected by this guaranty. This dealer is not introducing the article into interstate commerce by allowing it to sit dormant in his warehouse. From that point he may sell it in Hollywood or San Francisco or he may return it to the guarantor. He may never violate Sec. 301 (a) of the Act. He may never do any act that the guaranty was given to protect and if he did not, the guaranty would never become false within the meaning of the Act. We must recall that this guaranty was given on Feb. 23, 1943, to cover future shipments. The construction asked for by the appellant would penalize the manufacturer even though the dealer had never at any time during the ensuing years shipped any of the product interstate. It would penalize the manufacturer for a misbranded shipment if he had an express agreement with the dealer that such shipment was to go intrastate only.

B. THE GUARANTY DOES NOT BECOME A FALSE GUARANTY OR BROKEN UNTIL THE PRODUCT MOVES IN INTERSTATE COMMERCE.

It seems conclusive from the above reasoning that this guaranty is not and cannot be broken and does not become a false guaranty within the meaning of the Act unless and until the guaranteed person intro-

duces the article or delivers it for introduction into interstate commerce. The Act does not cover intrastate activities. It is the act of the dealer in introducing the adulterated or misbranded article into interstate commerce that the guaranty is given to protect. We must place ourselves in the shoes of the party signing the guaranty. This party must interpret the guaranty he is signing by the construction of Section 303 (c) (2). He would read that section to determine what his guaranty means. When the guarantor signs that guaranty he must understand that it is made only to protect the acts of the person guaranteed in wrongfully placing the article in interstate commerce. The guarantor signing should and would not intend it to cover shipments that were to go wholly intrastate.

C. THE "ARTICLES" ARE "ADULTERATED OR MISBRANDED WITHIN THE MEANING" OF THE ACT ONLY WHEN SENT INTERSTATE AND THE GUARANTOR COULD NOT INTEND OTHERWISE ON MAKING THE GUARANTY UNDER SECTION 303 (c) (2).

In *Weeks vs. United States*, 245 U.S. 618 (l.c. 622) the Court stated:

> "The statute does not attempt to make either kind of misbranding unlawful in itself, but does, as before indicated, make it unlawful to ship or deliver for shipment from one state to another an article of food which is misbranded in either way."

When can "such article" (Sec. 303 (c) (2)) be considered to be "adulterated or misbranded within the meaning of the Act"? The words "such article" in this section "in case of an alleged violation" refer to the articles which the person guaranteed *had* actually introduced or delivered for introduction into interstate commerce *when* he "violated Section 301 (a)" of the

Act, that is, when an article *was* so delivered by that person guaranteed, into interstate commerce. Therefore, when the guarantor signs such guaranty he can only intend to cover "such article" that actually goes interstate within the meaning of Sec. 201 (b) of the Act and Sec. 301 (a) of the Act because the Act itself so intends. And when is "such article" adulterated or misbranded within the meaning of the Act? The Act defines "misbranding and adulteration" in Sec. 501 and 502 of the Act. But the Act in these sections means to cover only articles that go into or are delivered to go into interstate commerce. (Weeks vs. U. S. Supra). The Act so far as it relates to adulteration or misbranding cannot be construed to apply to articles that are made, used and transported wholly intrastate. The misbranding or adulteration of an article that is shipped from San Diego to Hollywood and used there, and that never goes beyond that point, is not an adulteration or misbranding of an article "within the meaning of this Act". The adulteration or misbranding of an article does not include adulteration or misbranding of an article that never goes outside of the state in which it is manufactured. We must again place ourselves in the shoes of the guarantor to see what he should understand in the construction of Section 303 (c) (2), to see what the guaranty he is signing means. When the guarantor signs such guaranty he must necessarily have that construction herein stated in mind and he would never intend to have the guaranty go beyond that scope, and to make this certain in the mind of the guarantor, Sec. 303 (c) (2) of the Act uses the words "designating this Act", so that this Act must be stated in the guaranty to keep the guaranty within the definite meaning of the Act.

D. THE FAILURE TO ENACT SECTION 9 OF 1906 IN ITS OWN EXACT LANGUAGE IS OF LITTLE ASSISTANCE IN THE INTERPRETATION OF SECTION 301 (h) OF THE PRESENT ACT.

It is stated that Sec. 9 of the Food and Drugs Act of 1906 (34 Stat. 771) provided for the guaranty, and the same section stated that the guaranteeing party shall be amenable to the prosecution and penalties "which would attach in due course to the dealer under the provisions of this Act", and it is further stated that the present Act contains no direct statement that the penalties to be meted out to the guarantor are the same as those which would have attached to the offense of the party guaranteed; and that, therefore, clause (h) of Section 301 of the present Act would not be limited by the offense stated in clause (a) of Sec. 301. This does not help us in the construction of Sec. 301 (h) of the new Act, relating to the offense and punishment of the guarantor, for the following reasons:

In the 1938 Act, Congress has rewritten the whole of the 1906 Act. It has simplified the Act and saved language and handled the subject by a more direct method. It has extended the scope of the Act to include additional products. It has, in fact, reorganized the whole Act.

The new Act starts out with definitions (Sec. 201) and a whole section is devoted to that. The next section (Sec. 301) describes the prohibited acts, and all of the prohibited acts of the law are stated under one section. It then devotes another section (Sec. 303) to all of the penalties for the offenses under the Act.

The old Act began with the creation of an offense for manufacturing within a territory or the District

of Columbia of products adulterated or misbranded (21 U.S.C. Sec. 1, 1926), and in that same section provided for the penalty. Likewise in the next section (21 U.S.C. Sec. 2, 1926) provision was made for the offense of introducing adulterated or misbranded products into interstate commerce and in the same section provision was made for the penalty for such offense. A further separate section (Sec. 9 of the Act) (21 U.S.C. Sec. 13, 1926) was devoted to the protection of a dealer by a guaranty. In that same section the penalty for the offense of the guarantor was provided for.

Congress intended evidently in the new Act to shorten the language of the statute by placing all of the descriptions of the offenses briefly in one section and all of the penalties briefly in another. 5 Rep. No. 152, 75th Congress, 1st sess., p. 2 states: "The bill has been made shorter and less verbose than previous bills. That has been done without deleting the effective provisions." Congress did not want to delete the effective provisions of former Sec. 9. It is obvious that Congress intended the reasonable construction of Sec. 301 (h) and Sec. 303 (c) (2) as stated previously in this brief, by reading them together. It was not necessary to be more definite. The argument that the deleting of the definite statements referred to in the old Sec. 9 is of little or no value whatever, in interpretation when we consider all of these circumstances.

In *U. S. vs. Dotterweich*, 320 U.S. 277, it was necessary for the Supreme Court to construe the 1938 Act. Section 4 of the Act of 1906 was not placed in the Act of 1938. Section 4 provided that the act of the agent of the corporation should be deemed the act of the corporation "as well as that of the person". It

was argued from this by the defendant that the deletion of this section from the new Act showed that Congress did not intend that the agent of the corporation should be liable. It was argued also that this position was strengthened because the provision as to guaranty would relieve a corporation from liability for an offense but would not relieve the agent of the corporation from such liability. The words of the Court in construing the Act may be of assistance in the construction requested in this case by the defendant, Walsh. At page 280 the Court stated:

> "The guaranty clause cannot be read in isolation. The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938 Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience."

At page 281 the Court stated:

> "The history of federal food and drug legislation is a good illustration of the elaborate phrasing that was in earlier days deemed necessary to fasten criminal liability on corporations. Section 12 of the Food and Drugs Act of 1906 provided that [here Section 12 is quoted]. By 1938 legal understanding and practice had rendered such statement of the obvious superfluous. Deletion of words—in the interest of brevity and good draftsmanship—superfluous for holding a corporation criminally liable, can hardly be found ground for relieving from such liability the individual agents of the corporation."

This opinion shows that the deletion of the words "as well as that of the person", does not necessarily show that Congress did not intend that the agent of a

corporation could not be guilty of the offense. Likewise, in the case at bar, the fact that Congress did not see fit to repeat the exact language of Sec. 9 of the old Act is not of great importance in determining that Sec. 301 (h) should not be construed in connection with Sec. 303 (c) (2), and that Sec. 303 (c) (2) must not be read in isolation. Evidently Congress did not see the necessity of repeating these words of the old Section 9 and in the interest of brevity allowed the matter to be decided by the necessary construction of the sections read together, as shown above in this brief to be the reasonable construction.

I. IN SETTING OUT AN OFFENSE A PENAL STATUTE MUST BE PLAIN AND CERTAIN. A PERSON WITHIN ITS POSSIBLE RANGE SHOULD BE ABLE TO KNOW WITH REASONABLE CERTAINTY WHEN HE WOULD COMMIT AN OFFENSE. WE MUST NOT INTERPRET CONGRESS TO HAVE INTENDED A PARTY TO BE PUNISHED FOR A CRIME UNLESS THE STATUTE PLAINLY BRINGS HIS ACT WITHIN THE MEANING OF THE STATUTE.

Krichman vs. United States, 256 U.S. 363;
Pierce vs. United States, 314 U. S. 306;
United States vs. Larcher, 134 U.S. 624;
Champlin Refining Co. vs. Corporation Commission of Oklahoma, 286 U.S. 210;
Kraus & Bros. Inc. vs. United States, 327 U.S. 614 (1946).

In *Krichman vs. United States, supra*, the Court stated (l.c. 367-8):

"The government admits that the statute is ambiguous. While criminal statutes are to be given a reasonable construction, ambiguities are not to be solved so as to embrace offenses not clearly within the law. We are unable to remedy the uncertainties of this statute by attributing to

> Congress an intention to include a baggage porter with those who discharge official duties in the operation of a railroad controlled by an officer of the government."

In *Pierce vs. United States, supra*, the Court stated (l.c. 311):

> "These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. Lanzetta v. New Jersey, 306 US 451, 83 L ed 888, 59 S. Ct. 618, and cases cited. While the act should be interpreted 'so as . . . to give full effect to its plain terms,' Lamar v. United States, 241 US 103, 412, 60 L ed 912, 915, 36 S Ct 535; United States v. Barnow, 239 US 74, 60 L ed 155, 36 S Ct 19, we should not depart from its words and context."

In *Kraas & Bros., Inc. vs. United States, supra* the Court applied the general rule of construction of a criminal statute to a regulation made by the Administrator under power given by the Emergency Price Control Act of 1942. The Court stated that such regulation or a criminal statute must be explicit, unambiguous, and give adequate information as to the criminal conduct and that the criminal conduct must be set forth with clarity.

If Congress intended to make it an offense to misbrand an article that moved intirely intrastate or to falsely guarantee an article so moving, it should have made the Act so that plainly the construction of this appellee could not be reasonably placed on the Act. Congress did not clearly so state. If it is held that Con-

gress so intended, then to say the very least, it left the matter very much confused.

F. THE SCOPE OF A STATUTE DEFINING A CRIME CANNOT BE EXTENDED BEYOND THE MEANING OF ITS WORDS REASONABLY INTERPRETED IN ORDER TO BROADEN THE STATUTE TO COVER A GENERAL INTENT OF CONGRESS. "STATUTORY POLICY IS NOT A SUBSTITUTE FOR REASONABLE CERTAINTY."

United States v. Harris, 177 U.S. 305;
United States v. Wiltberger, 5 Whet. 76;
Sarlls v. United States, 152 U.S. 570;
Krichman v. United States, *supra*.

In *United States v. Harris*, *supra*, the Court stated (l.c. 308, 309):

> "It may be conceded that it was the intention of Congress to subject receivers of railroad companies appointed such by courts of the United States, to the valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought."

The Court further stated (l.c. 309):

> "It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a

penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning."

The Court then quoted from Chief Justice Marshall in *United States vs. Wiltberger, supra:*

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law, for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, and not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. . . . But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words,—especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case

> which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

Congress has no way to express itself in making a law except by printed language, the usage of words. Of course, we should have in mind the general purpose of a statute, the purpose of the language and words, in order to construe their meaning when there is doubt, but we must not stultify words and language and the proper relation of one clause to another to effect a general purpose of the Act. We have above tried to ascertain the reasonable meaning of plain words used insofar as purpose of their usage can legitimately assist. Just because the general purpose of the statute is good and is to prevent adulteration and save the health of citizens or because the 1938 Act was designed to stiffen the penalty gives us no unlimited right to so amplify the meaning of these words and clauses as they actually and plainly express themselves in relation to each other, to enable prosecuting authorities to penalize every act that might be by them construed to injure the public health in the handling of foods and drugs, or that might be thought by them to be of assistance in enforcing the Act.

PART II:

EVEN HAD IT SO ATTEMPTED IN SECTION 301 (b) OF THE ACT, CONGRESS WOULD HAVE BEEN WITHOUT POWER TO ENACT

A LAW MAKING IT AN OFFENSE TO MISBRAND OR ADULTERATE PRODUCTS MOVING SOLELY IN INTRASTATE COMMERCE OR MAKE IT AN OFFENSE TO FALSELY GUARANTEE SUCH PRODUCTS SO MOVING.

Defendant asserted the unconstitutionality of such a provision in his argument in the District Court (R. 10 to 11 and 27, paragraph 9) and now so maintains. Defendant's attorney did not believe it necessary, in discussion before the District Court, to argue this point at length because he believed point (1) on page 3 was sufficient to cause the dismissal.

This is not necessary or appropriate to protect interstate commerce and is not a more convenient method of protection than exists without such law. The giving of a guaranty relating to branding of a product moving wholly intrastate does not have a direct or substantial effect on interstate commerce. It does not affect it in any "close and intimate fashion."

The interpretation maintained by the government would make it an offense for a manufacturer to give to a dealer a guaranty not in accord with the ingredients of the product even though the dealer traded wholly intrastate.

The question arises whether Congress would have this power.

In *United States vs. Wrightwood Dairy Company*, 315 U.S. 110 cited by appellant (appellant's brief, p. 14), the principle was laid down in general that if intrastate commerce directly and substantially interferes with interstate commerce regulations under a law, then that intrastate commerce could be regulated so

that it does not so interfere. The dairy products made and sold wholly intrastate in or about Chicago were selling at prices under the price regulation for dairy products going through interstate commerce. It was held (l.c. 125) in that case that the interstate commerce price could be regulated because it *directly* and *substantially interfered* with the price regulating of similar products going through interstate commerce. In fact, it destroyed the interstate commerce in dairy products in Chicago and its vicinity.

The Court stated (l.c. 120):

> "It is the effect upon interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power."

In *Consolidated Edison Company vs. National Labor Relations Board*, 305 U.S. 197, the question related to whether or not the intrastate activities of an electric company interfered with interstate commerce to the end that the National Labor Act could apply to intrastate commerce. The Court decided that the conducting of the intrastate commerce of the electric company could directly and seriously interfere with interstate commerce. It stated (l.c. 221):

> "Instantly the terminals and trains of three great interstate railroads would cease to operate; interstate communication by telegraph, telephone and radio would stop; lights maintained as aids to navigation would go out * * *."

This was quoted with approval from the opinion of the Circuit Court of Appeals to show how important a labor dispute in the intrastate commerce transactions could be in interference with interstate commerce.

The Court further stated (l.c. 222):

> "And whether or not particular action in the conduct of intrastate enterprises does affect that commerce in such close and intimate fashion as to be subject to federal control is left to be determined as individual cases arise. Id., see also Santa Cruz Packing Company vs. National Labor Relations Board, 303 U.S. 453, 466, 467."

Again the Court stated (l.c. 223):

> "The justification for the exercise of federal power should clearly appear (Florida vs. U. S., 282, U.S. 194, 211, 212), but the question in such a case would relate not to existence of the federal power but to the propriety of its exercise on a given state of facts."

In the case at bar that situation does not arise. It does not become necessary to penalize a citizen who misbranded an article shipped and used wholly intrastate in order to prevent misbranding of articles that go interstate, nor does it become necessary to penalize the giving of a false guaranty of products going wholly in intrastate business. There would be no sufficient reason for Congress to interfere with wholly intrastate transactions to prevent adulteration in interstate transactions. The enforcing officer could easily examine the adulterated articles in transit or in the state to which they are sent from the state of their origin to ascertain whether the law has been broken and interstate commerce interfered with under the Act. It is just as easy and as convenient and efficient to examine the adulterated article in Wichita, Kansas, after it has gone from Hollywood, California, into interstate commerce as it is to examine it in Hollywood, before it enters the channels of interstate commerce. An examination of the article at Hollywood is not more appropriate, ad

vantageous or adequate to prevent adulteration or misbranding than an examination of the article after it reaches another state.

We doubt the power of Congress to go beyond the scope of our reasonable construction of the Act in this respect for the purpose only of giving to the enforcing officer an alleged more "appropriate means" of enforcement. It is not a more appropriate means. It is a wholly unnecessary means and therefore an inappropriate means.

Here a guaranty is given on all future shipments. Under the interpretation asked for by the government, Section 301 (h) would penalize the giving of a guaranty that was not true relating to any intrastate shipment. It would penalize such act even though the dealer never at any time shipped any of the products interstate or never intended to ship interstate the product in question. It would penalize the manufacturer even though by express agreement between him and the dealer the particular product in question was to go wholly intrastate. That would be the effect of the construction of 301 (h) if we did not confine its meaning by reference to Section 303 (a) (2) and Section 301 (a) of the Act. And this is not necessary or appropriate.

Such interpretation of this provision would come within the meaning of the holdings in *Schechter Poultry Corp. vs. U. S.*, 295 U.S. 495. It would be regulating business wholly within a state that had never come and would never come within the flow of interstate commerce just as in that case the poultry had come to rest within the State of New York and the transactions concerning it thereafter were wholly intrastate business.

In that case (l.c. 546), the Court stated:

> "In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. * * * But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

U. S. vs: Ferger, 250 U.S. 199, cited by appellant (page 16, appellant's brief) is not of great assistance here. The indictment charged that defendant counterfeited bills of lading to represent that goods were going in interstate commerce. These bills of lading were made complying with the Congressional Act relating to interstate and foreign commerce. The Court held that such bills of lading "for the movemnt of interstate commerce are instrumentalities of that commerce which Congress under its power to regulate commerce has the authority to deal with * * *." (l.c. 204). The Court stated that such bills of lading "are the efficient means of credit resorted to for the purpose of securing and fortifying the flow of a vast volume of interstate commerce * * *." Based upon these statements, the Court held that Congress had the power to punish the making of the fraudulent interstate bills of lading "as

a means of protecting and sustaining the vast volume of interstate commerce operating and moving in reliance upon genuine bills'.' In that case there is a direct and material interference with interstate commerce by an act intimately associated with it.

Currin v. Wallace, 306 U.S. 1, cited by appellant (page 14, appellant's brief), tested the Tobacco Inspection Act which required uniform standards of grading tobacco, etc. and under it markets were established for the sale of tobacco at auction. In the market in question in that case, 62% of the sales were made for the purpose of moving the product into interstate commerce and such percentage was so moved. The tobacco sold which was used intrastate could not be segregated in any practical way from that which moved interstate and the Court based the constitutionality of the Act on the finding as follows (l.c. 11):

> "Here, the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale."

In the guaranty of foods and drugs going interstate, the intrastate business is not so commingled with the interstate business. It is not necessary or appropriate in the case at bar to so burden the intrastate business to protect the interstate business.

The statute and penalty could be effectively applied solely to the misbranded products going interstate and therefore to the guaranteeing of such products.

See Appendix for relative value of decisions under other congressional acts, such as National Labor Relations Act of 1935.

We therefore conclude that Congress has no power to make Section 301 (h), include products moving wholly intrastate. *The information does not state facts sufficient to show that such regulation by Congress is appropriate nor are there sufficient judicially noticed facts to so show.*

PART III.

THE INFORMATION IS THEREFORE INSUFFICIENT AND THE UNITED STATES DISTRICT COURT WAS JUSTIFIED IN DISMISSING IT.

If our interpretation of the Act is correct, then the information is insufficient and the United States District Court was right in dismissing it because some of the essential facts constituting the offense are not stated in plain and definite language: that is, the information contains no statement that Richard Harrison Products introduced the defective product or delivered it for introduction into interstate commerce.

Evans vs. United States, 153 U.S. 584
Pettibone vs. United States, 148 U.S. 197
Moens vs. United States, 267 Fed. 317
United States vs. Phelps Dodge Mercantile Co., 157 Fed. 2d No. 7, p. 453 of Fed. Rep. Advance Sheets

Rule 7 (c) of the Federal Rules of Criminal Procedure states:

> "Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

The Court, in *Evans vs. United States*, 153 U.S. 584, l.c. 587 (38 L. Ed. 830), stated:

"The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged."

The Court, in *Pettibone vs. United States*, 148 U.S. 197 (37 L. Ed. 419) stated:

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly, and not inferentially, or by way of recital."

The Court stated in *Moens vs. United States*, 267 Fed. 317 (l.c. 322):

"A clear rule as to the sufficiency of an indictment for a statutory offense is stated in Commonwealth vs. Young, 15 Grat. (Va.) 664, as follows: 'If the indictment may be true, and still the accused may not be guilty of that offense, the indictment is insufficient.'"

In the case at bar, to make the information good, it would be necessary to supply a statement to it by inference, intendment or implication.

In *United States vs. Phelps Dodge Mercantile Co.*, *supra*, the Court held that a statement that seizure was made while a shipment was still in the original packages after it had gone interstate, was no statement to the effect that the seizure was made while it was in interstate commerce.

The information states:

"That on or about February 24, 1945 and prior and subsequent thereto, the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food

labeled as aforesaid, which had been supplied by said defendant;"

These are the only statements in the information that relate to the shipments even possibly going into interstate commerce. From these statements we would be compelled to draw by inference that this shipment in question from defendant to Richard Harrison Products was actually introduced by Richard Harrison Products into interstate commerce or was actually delivered for introduction into interstate commerce. For all the information actually states, this shipment could have gone to Hollywood and stopped there or it could have been shipped from Hollywood to San Francisco and consumed there. We would be compelled, therefore, to assume that between various acts that could have occurred those were performed that introduced the product into interstate commerce and made the man guilty, instead of presuming that those acts were performed which would have made the shipment intrastate and have the man innocent of crime.

All of the statements of the indictment made plain and direct, could be true and yet the defendant be innocent, as stated in the *Moens* case above mentioned.

GENERAL DISCUSSION OF INFORMATION

Congress only intended, under a reasonable construction of the Act, not that the giving of the guaranty was an offense but that its *breach* was the offense when this breach occurred by the misbranded or adulterated articles going into interstate commerce. We maintain that our interpretation is not a restrictive one but a reasonable interpretation and that interpretation which a guarantor would reasonably make when he

signs the guaranty. The construction maintained by the appellant goes far beyond that which may be necessary to make the Act effective or give the enforcing authorities a fair opportunity of its enforcement.

This information does not state that defendant Walsh delivered the shipment to Richard Harrison Products, of Hollywood, for the purpose of its being sent into interstate commerce or that it ever went into interstate commerce and does not state that Richard Harrison Products ordered the shipment from defendant Walsh to send it into interstate commerce or that this shipment was ever intended to become or did become a part of the commerce between this state and "any place outside thereof." Under the construction of the Act which the appellant would have us make, the defendant would be guilty, and subject to the penalties of the Act even if the shipment went to Richard Harrison Products and stayed in Hollywood and never left there, or was shipped and consumed in the City of Sacramento or was returned to defendant; and defendant would, under such construction, be liable and suffer the heavy penalties of the Act even if there was an understanding or agreement between himself and Richard Harrison Products that the shipment was to take one or another of the above courses and never reach interstate commerce. The information is wholly silent relative to the purpose of the shipment and relative to whether or not that shipment was intended to or did reach the channels of interstate commerce. Such interpretation would not be a liberal interpretation allowed by decisions to effectuate the purposes of the Act. It would rather be a narrow and strict interpretation against manufac-

turers, a harsh interpretation enabling the prosecuting authorities to harass well-intending dealers and manufacturers of foods and drugs.

CONCLUSION

For the foregoing reasons, the order of the District Court should be sustained.

Dated April, 1947.

Respectfully submitted,

MILLER, HIGGS, FLETCHER and GLEEN

By Eugene W. Miller

Eugene W. Miller, Partner

APPENDIX

VALUE OF DECISIONS UNDER NATIONAL LABOR RELATIONS ACT OF 1935 AND FAIR LABOR STANDARDS ACT OF 1938 AND OTHER ACTS REGULATING INTERSTATE COMMERCE.

Decisions under the above acts are not necessarily controlling in the interpretation of the Food, Drug and Cosmetic Act of 1938 except in their relation to the power Congress may have under the Constitution to enact the laws in question. On the matter of whether or not a circumstance comes within the provisions of any of the above acts must evidently stand upon the separate construction of each of the acts.

The National Labor Relations Act asserts in Section 160 of Title 29, U.S.C.A., that the Board is empowered to prevent "any person from engaging in any unfair labor practice (listed in Section 158) affecting commerce".

The term "affecting commerce" is defined in paragraph 7 of Section 152 of the Act to mean "in commerce or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce". Commerce is also defined in that Act in paragraph 6 of Section 152. Decisions, therefore, ascertaining what may come within the Act must interpret these paragraphs of Section 152 and cannot necessarily be used in the construction of another act which has no similar language. Many decisions interpret what acts affect commerce or burden or obstruct it or the free flow of commerce or tend to lead to a labor dispute burdening or obstructing commerce or its free flow.

The Fair Labor Standards Act of 1938 likewise defines its scope. Section 206 prevents the employer from employing for more than the designated number of hours per week "any of his employees who is engaged in commerce or in the production of goods for commerce".

Section 203 of that Act states that an employee is deemed "to have been engaged in production of goods" for commerce "if such employee was employed in producing * * * such goods or in any process or occupation necessary to the production thereof in any state." The decisions, therefore, necessarily interpret the meaning of those sections to define the scope of that Act and many decisions interpret when an employee is in an occupation or process necessary to production.

We are not concerned in decisions under these acts or under the Tobacco Inspection Act or the Agricultural Marketing Act except insofar as they may define the powers of Congress under the Constitution in relation to interstate commerce.

SUPREME COURT OF THE UNITED STATES

No. 718.—October Term, 1946.

The United States of America, Appellant, v. Michael Walsh, an Individual Trading as Kelp Laboratories.	On Appeal From the District Court of the United States for the Southern District of California.

[May 19, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

This appeal brings before us § 301 (h) of the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 1042, 21 U. S. C. § 331 (h), which prohibits the giving of a false guaranty that any food, drug, device or cosmetic is not adulterated or misbranded within the meaning of the Act.

Appellee does business in San Diego, California, under the name of Kelp Laboratories. An information has been filed, charging appellee with having given a false guaranty, in violation of § 301 (h). The following facts have been alleged: In February, 1943, appellee gave a continuing guaranty to Richard Harrison Products, of Hollywood, California, stating that no products thereafter shipped to the latter would be adulterated or misbranded within the meaning of the Act. On February 24, 1945, while the guaranty was in full force and effect, appellee consigned to Richard Harrison Products, at Hollywood, a shipment of vitamin products which were allegedly adulterated and misbranded—thereby making the guaranty false in respect of that shipment. Prior and subsequent to the date of the shipment, Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of the vitamin product supplied by appellee.

Appellee moved to dismiss the information on the ground that it did not state an offense. The argument was that § 301 (h) applies only to a guaranty that is false relative to an interstate shipment, whereas the alleged shipment here was to a consignee within California, the state of origin, and there was no allegation that the consignee purchased the order for someone outside California or that it intended to sell the products in its interstate rather than its intrastate business. The District Court gave an oral opinion sustaining appellee's contention and granting the motion to dismiss. The case is here on direct appeal by the United States.

The Federal Food, Drug, and Cosmetic Act rests upon the constitutional power resident in Congress to regulate interstate commerce. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious, adulterated and misbranded articles of the specified types. *United States* v. *Dotterweich*, 320 U. S. 277, 280. It is in that interstate setting that the various sections of the Act must be viewed.

But § 301 (h), with which we are concerned, does not speak specifically in interstate terms. It prohibits the "giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false," the only exception being as to a false guaranty given by a person who, in turn, relied upon a similar guaranty given by the person from whom he received in good faith the adulterated or misbranded article.[1] Nothing on the face of the section limits its application to guaranties relating

[1] Section 301 (h) prohibits "The giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false, except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guaranty or undertaking referred to in section 303 (c) (3), which guaranty or undertaking is false."

to articles introduced or delivered for introduction into interstate commerce. From all that appears, its proscription plainly extends to the giving of any false statutory guaranty, without regard to the interstate or intrastate character of the shipment in question, to those who are engaged in the business of making interstate shipments.

Nor do we find any interstate limitation of the type which appellee proposes in the reference made in § 301 (h) to § 303 (c) (2).[2] That reference is made simply to define the type of guaranty or undertaking the falsification of which is prohibited by § 301 (h). Instead of spelling out the matter, § 301 (h) adopts the reference in § 303 (c) (2) to "a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect . . . that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act." The fact that § 303 (c) (2) relieves a holder of such a guaranty from the criminal penalties provided by § 303 (a) for violating § 301 (a) does not carry over the interstate limitation of § 301 (a) to § 301 (h). Section 301 (a) prohibits the introduction or delivery for introduction into interstate commerce of illicit articles,[3] and § 303 (c) (2) relieves one from the

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[2] Section 303 (c) (2) provides that no person shall be subject to the penalties of § 303 (a) "for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act, or to the effect, in case of an alleged violation of section 301 (d), that such article is not an article which may not, under the provisions of section 404 or 505, be introduced into interstate commerce."

[3] Section 301 (a) prohibits "The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

liabilities of such introduction if one has a guaranty or undertaking as therein described. Section 301 (h) has adopted that description for the entirely different purpose of informing persons what kind of a guaranty or undertaking may not be given falsely. In other words, § 301 (a) is directed to illegal interstate shipments, while § 301 (h) is directed to the giving of false guaranties. Guaranties as described in § 303 (c) (2) may be used by interstate dealers in connection with either interstate or intrastate shipments and those guaranties that are false are outlawed by § 301 (h).

It is true, of course, that the guaranty referred to in § 303 (c) (2) is one given for the purpose of protecting the dealer "in case of an alleged violation of section 301 (a)," thereby relieving him of liability if he reships adulterated or misbranded goods in interstate commerce. But where such a guaranty, as in this case, is given to a dealer regularly engaged in making interstate shipments and who may therefore have need of the guaranty, § 301 (h) imposes liability on the guarantor if that guaranty turns out to be false. And that liability attaches even where the particular shipment which renders the guaranty false is not alleged to have been an interstate one.

It is significant that § 301 (h) had no counterpart in the predecessor statute, the Food and Drugs Act of 1906, 34 Stat. 768. Under § 9 of that Act, a dealer could not be prosecuted for shipping adulterated or misbranded articles in interstate commerce if he had a guaranty of a type similar to that referred to in the present statute. If there were such a guaranty, the guarantor was subject to the penalties which would otherwise attach to the dealer. The result was that the guarantor was not liable on account of a false guaranty unless the dealer had shipped the prohibited article in interstate commerce. *Steinhardt Bros. & Co. v. United States*, 191 F. 798, 800; *United*

States v. *Charles L. Heinle Specialty Co.*, 175 F. 299, 300–301. There was no liability for issuing a false guaranty as such to one engaged in an interstate business. But in the 1938 Act, Congress added a new liability in the form of § 301 (h), making the guarantor liable for giving a false guaranty of the type referred to in § 303 (c) (2). We find it impossible to say that the framers of the 1938 Act added § 301 (h) for the useless purpose of achieving the same result as had been reached under the 1906 Act without such a provision.

We thus conclude that § 301 (h) definitely proscribes the giving of a false guaranty to one engaged wholly or partly in an interstate business irrespective of whether that guaranty leads in any particular instance to an illegal shipment in interstate commerce. Such a construction is entirely consistent with the interstate setting of the Act. A manufacturer or processor ordinarily has no way of knowing whether a dealer, whose business includes making interstate sales, will redistribute a particular shipment in interstate or intrastate commerce. But if he guarantees that his product is not adulterated or misbranded within the meaning of the Act, he clearly intends to assure the dealer that the latter may redistribute the product in interstate commerce without incurring any of the liabilities of the Act. And the dealer is thereby more likely to engage in interstate distribution without making an independent check of the product. The possibility that a false guaranty may give rise to an illegal interstate shipment by such a dealer is strong enough to make reasonable the prohibition of all false guaranties to him, even though some of them may actually result only in intrastate distribution. By this means, some of the evils which Congress sought to eliminate are cut down at their source and the effectiveness of the Act's enforcement is greatly enhanced.

So construed, § 301 (h) raises no constitutional difficulties. The commerce clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulation of interstate commerce. Where that effectiveness depends upon a regulation or prohibition attaching regardless of whether the particular transaction in issue is interstate or intrastate in character, a transaction that concerns a business generally engaged in interstate commerce, Congress may act. Such is this case.

The judgment of the District Court is accordingly

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 718.—October Term, 1946.

The United States of America, Appellant, *v.* Michael Walsh, an Individual Trading as Kelp Laboratories.	On Appeal From the District Court of the United States for the Southern District of California.

[May 19, 1947.]

Mr. Justice Jackson, dissenting.

Stretch the Food and Drugs Act as we will, I cannot make it cover this charge as a crime. The statutory scheme is to make a crime of "The introduction or delivery for introduction into interstate commerce" of adulterated or misbranded goods. 52 Stat. 1042, 21 U. S. C. § 331 (a) and (d).

But since many shippers buy goods of others and do not know their precise ingredients, Congress allowed an escape for the violator, provided he acted in good faith and could trace the responsibility to another. This he must do by producing a signed guaranty or undertaking, and the statute requires that it shall be conditioned "to the effect, *in case of an alleged violation of* § 331 (a), that such article is not adulterated or misbranded . . . or to the effect, *in case of an alleged violation of* § 331 (d), that such article is not an article" forbidden shipment by stated paragraphs of the Act. (Emphasis added.) 52 Stat. 1043, 21 U. S. C. § 333 (c).

It will be noticed that Congress not only provided but repeated that the statutory bond required is "in case of an alleged violation" by introducing or delivering for introduction of goods in interstate commerce. No such violation has been alleged here; these goods were never

introduced or delivered for introduction into interstate commerce. But the Court seems to think it is enough that there are some grounds for expecting that this crime possibly, or probably, or perhaps pretty certainly, would eventually be committed.

Of course, if the assured had committed this offense and had fallen back on the guarantor, the statute which reached the assured would not be sufficient. To punish the responsible person, it was made a crime to give a false guaranty "referred to in" the statute. 52 Stat. 1042, 21 U. S. C. § 331 (h).

The Government now seeks to exact criminal responsibility on a guarantee, expressly conditioned only "in case of violation," in a case of no violation. Until a violation is alleged, the guaranty plays no statutory role at all. It might afford a cause of action if false, but that is quite different from making it a crime. For it is no guaranty at all for criminal prosecution purposes if violation of neither § 331 (a) nor § 331 (d) is alleged. The statute requires such violation to be alleged only, not proved, in order to put the guarantor rather than the assured to the proof. This is the only instance I recall where the guarantor is liable when there is no breach of the condition of the bond. The whole plan was to have a substituted liability in case the violator of the Act became such in good faith. This decision makes a new, independent and original liability where there has been no alleged violation by moving the goods in interstate commerce.

I do not think we should take such liberties in expanding criminal statutes in which the sovereign once was considered under a duty to be explicit and the subject entitled to the doubt.